85-260

Supreme Court, U.S.
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No. 85-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

MANHATTAN INDUSTRIES, INC.,
Petitioner,

v.

LAWRENCE GOLDSTEIN,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1.

If an employee is terminated by his employer and alleges that his termination is in violation of the Age Discrimination in Employment Act, 29 U.S.C. § 621, et seq., may he establish a prima facie case under the McDonnell/Douglas test by showing that even though the replacement employee was over 40 years of age and thus outside the protected class, the replacement employee was arguably "substantially younger", without the existence of any reason to deviate from the requirement of the McDonnell/Douglas test that the replacement employer be outside the protected class?

2.

If an employee is a non-exclusive salesman representing several unrelated manufacturers and is terminated by one of them in violation of the Age Discrimination in Employment Act, 29 U.S.C. § 621, et seq., is the terminating employer liable not only for "lost income" attributable to the employee's inability to sell for the terminating employer but also for any reduction in sales volume which might occur with regard to sales by the employee for the other, unrelated employers under the theory that the authority to represent other companies was a "fringe benefit" of the employment by the terminating employer within the contemplation of the A.D.E.A.?

PARTIES

All parties to this proceeding are contained in the caption of the case in this Court.

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PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

This petition is an appeal from a decision of the Eleventh Circuit Court of Appeals reported in 758 F.2d 1435 (11th Cir. 1985). A copy of the decision of the Circuit Court is contained within the Appendix.

GROUNDS FOR JURISDICTION

This application for a Writ of Certiorari is on a judgment entered in the United States Court of

Appeals for the Eleventh Circuit on April 25, 1985, and the denial of a properly filed Petition for Rehearing and Suggestion for Rehearing En Banc which de ial was dated May 30, 1985. This Court has jurisdiction of the application for a Writ of Certiorari pursuant to 28 U.S.C. § 1254 and 28 U.S.C. § 2101.

STATUTE INVOLVED

The Age Discrimination in Employment Act is contained in 29 U.S.C. § 621, et seq. but only two sections of the Act are applicable to this Petition. The first is the prohibition section of the Act at 29 U.S.C. § 623 which provides as follows:

> (a) It shall be unlawful for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

The second pertinent section of the Act is the enforcement provision contained in 29 U.S.C. § 626 which provides as follows:

> (b) The provisions of this chapter shall be enforced in accordance with the powers, remedies, and procedures provided in sections 211(b), 216 (except for subsection (a) thereof), and 217 of this title, and subsection (c) of this section. Any act prohibited under section 623 of this title shall be deemed to be a prohibited act under section 215 of this title. Amounts owing to a person as a result of a violation of this chapter shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of section 216 and 217 of this title: Provided, That liquidated

damages shall be payable only in cases of willful violations of this chapter. In any action brought to enforce this chapter the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter, including without limitation judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section. Before instituting any action under this section, the Secretary shall attempt to eliminate the discriminatory practice or practices alleged, and to effect voluntary compliance with the requirements of this chapter through informal methods of conciliation, conference, and persuasion.

STATEMENT OF THE CASE

Manhattan Industries, Inc. (hereinafter "Manhattan") is a corporation engaged in various aspects of the apparel industry and maintains as one of its divisions a ladies' apparel divison known as Lady Manhattan. Lawrence Goldstein (hereinafter "Goldstein") took a job as a sales representative for the Lady Manhattan division in 1960, at which time he was 38 years of age.

Goldstein was an exclusive sales representative of Lady Manhattan and was assigned a territorial responsibility which included all stores within his territory. Goldstein travelled through his assigned territory but maintained a permanent apparel showroom in Atlanta, Georgia, which was used primarily during the seasonal markets. Manhattan had various types of employment relationships with its sales representatives and not all of them were exclusive. Some representa-

tives were allowed to represent both Manhattan and other apparel manufacturers while others, like Goldstein, were employed on an exclusive basis.

In 1979, Manhattan undertook a reorganization of its marketing in the Lady Manhattan division and stores that were classified as "major" stores were taken away by Manhattan from its exclusive salesmen and were transferred to the New York office. These stores were known as "house accounts" and were to be serviced directly by Manhattan personnel in New York.

Salesmen that had been employed on an exclusive basis, like Goldstein, would naturally lose a source of income as a result of this change in marketing strategy, so Manhattan allowed its sales representatives that had been exclusive but who were losing their house accounts to represent non-competing apparel lines along with the Manhattan products. Thus, all sales representatives, whether employees or agents, were non-exclusive and could represent outside lines. In the case of Goldstein, these outside lines could be displayed and sold from the Manhattan permanent showroom in Atlanta so long as Goldstein paid the rent and expenses on the showroom.

Goldstein developed several non-competing lines that he undertook to represent and within a short period of time any loss of gross income that he suffered by virtue of losing his house accounts was compensated by the addition of the non-competing lines. In fact, the evidence showed that Goldstein's income from his outside lines increased steadily while his sales of his Manhattan products declined.

The management decision to develop house accounts proved to be an unsound one and in 1982, Manhattan

placed a new management team in place and one of its first decisions was to return sales representatives that had been exclusive to an exclusive basis and to begin to develop exclusive sales representatives throughout all of the sales territories in the United States. The return to exclusivity of sales representatives that had been exclusive before was initiated almost immediately and at the time of Goldstein's termination several other territories had been converted to an exclusive basis.

Goldstein was terminated in March, 1982, Manhattan contending that the termination was caused by Goldstein's refusal to give up his non-competing lines and return to an exclusive basis and Goldstein contending that his termination was based upon his age and therefore violative of the Age Discrimination in Employment Act (hereinafter "ADEA").

At the trial of the case, Goldstein was unable to present evidence of a pattern of discrimination statistically, was unable to present any direct evidence of discriminatory intent, but contended that he established a prima facie case by meeting the standard commonly known as the McDonnell/Douglas test.

Goldstein argued and the Trial Court agreed that since he proved that he was a member of the protected class, that adverse employment action was taken against him, that he was qualified for the position from which he was terminated and that since he was replaced by a person "substantially younger" that a prima facie case had been established. The United States Court of Appeals for the Eleventh Circuit agreed that it was not necessary to show that the replacement employee was outside of the protected

class to establish a prima facie case of discrimination and held that the substantial age difference between Goldstein and the replacement employee—14 years—was sufficient to comply with the McDonnell/Douglas standard.

The Trial Court also allowed Goldstein to present evidence of earnings which he allegedly lost from his outside lines which Goldstein contended was a result of the loss of his ability to represent Manhattan since Manhattan was his "headliner" and the loss of the showroom in Atlanta and the good name of Manhattan allegedly caused a reduction in sales for outside lines. Goldstein presented expert testimony projecting what Goldstein would have earned from his outside lines had he continued to represent Manhattan and the jury was allowed to award to Goldstein a sum sufficient to compensate him not only for his income loss from his inability to sell Manhattan products, income which would equal the amount which he would have earned had he continued to be employed by Manhattan, but also an amount equal to his alleged loss of income from outside lines. The Trial Court and the Eleventh Circuit Court of Appeals held that loss of earnings from outside lines was a "concomitant of employment" which was contemplated and authorized as an item of damages by the ADEA.

The jury returned a verdict in favor of Goldstein and against Manhattan in the amount of $175,000.00 and further held that the action of Manhattan was a wilful violation of the ADEA. The jury's award was reduced by the Trial Court upon motion to the sum of $146,700.00 since the jury's award exceeded the evidence of damages under any theory. The ultimate

award to Goldstein in the sum of $146,700.00 represented lost income from Manhattan plus lost income from the sale of outside lines and was doubled since there was finding of wilful violation.

Following the jury's verdict, appropriate motions were filed at the trial level, an appeal was taken to the United States Court of Appeals for the Eleventh Circuit and ultimately the Court of Appeals for the Eleventh Circuit affirmed with a dissent by the Honorable Frank M. Johnson, Jr., who indicated that the connection between Goldstein's work for Manhattan and his sale of "outside" lines was too tenuous, as an analytic matter, to justify inclusion under the relevant case law or to be included within the statutorily allowable damages under the ADEA.

ARGUMENT

Introduction

This case presents to this Court for the first time two issues of special importance. The first issue concerns the application of the McDonnell/Douglas test to a termination ADEA case and sets forth an opportunity for this Court to decide if the test should be modified to require only that a replacement employee be younger than the terminated employee and not necessarily outside the protected class. Manhattan respectfully submits that this standard has been so altered by the Trial and Circuit Court as to become meaningless and abusive, all in violation of this Court's prior decisions.

Second, this case presents a unique opportunity to establish the outside parameters of the enforcement

section of the ADEA. Very little guidance has been given by this Court to date and this case should resolve many of the conflicting interpretations given by the Circuit Courts on the proper way to measure damages for lost wages.

I.

In this case, the terminated employee was a member of the protected class under the Age Discrimination in Employment Act, 29 U.S.C. § 621, et seq., hereinafter "ADEA" and was therefore entitled to protection of that Act. It has long been recognized that it is possible in a discrimination case to establish a prima facie case by application of the standard articulated by this Court in *McDonnell/Douglas Corp.* v. *Green,* 411 U.S. 792, 93 S.Ct. 817, 36 L.Ed.2d 668 (1973) as refined by *Texas Department of Community Affairs* v. *Burdine,* 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981). Under the traditional McDonnell/Douglas test, in order to establish a prima facie showing of age discrimination, the Plaintiff must satisfy all four prongs of that test and demonstrate (1) that he was a member of the protected class, (2) was discharged or otherwise subjected to adverse employment treatment, (3) was replaced by a person outside the protected class, and (4) was qualified to perform the job. *Houser* v. *Sears, Roebuck & Co.,* 627 F.2d 756 (5th Cir. 1980); *Marshall* v. *Goodyear Tire & Rubber Co.,* 554 F.2d 730 (5th Cir. 1977).

This standard has been applied to ADEA cases by all of the circuits that have considered the same and it is undisputed that certain factual situations have arisen wherein some deviation from a strict applica-

tion of the McDonnell/Douglas test was allowed and was authorized. These variations always apply to the third prong of the test and it is that prong which is at issue here.

An examination of the cases which have authorized a deviation from the McDonnell/Douglas test shows that virtually all of these cases wherein deviation was allowed have fallen into one of two categories. The first is a factual situation wherein there was a reduction in force which, of necessity meant that there was no replacement employee and therefore the test had to be modified to accept this factual distinction, e.g. *Williams* v. *General Motors,* 656 F.2d 120 (5th Cir. 1981). The second type of factual situation wherein a deviation of the strict application of the test has been allowed are cases wherein the position of employment was one that required such skill and training that it is unreasonable to expect a replacement employee to be someone outside the protected class, e.g. *McCorstin* v. *United States Steel,* 621 F.2d 749 (5th Cir. 1980). Neither of these factual situations exist in this case and the Trial Court chose merely to abandon the third prong of the McDonnell/Douglas test and to substitute in lieu of the requirement that the replacement employee be outside the protected class a requirement that the replacement employee must only be "substantially younger" than the terminated employee.

The Eleventh Circuit Court of Appeals (hereinafter "Circuit Court") affirmed this modification and although the Circuit Court failed to state plainly that it was making such alteration of the McDonnell/Douglas test a reading of the decision demonstrates quite clearly that this was in fact what was done.

The Circuit Court opinion notes that this was not a reduction in force case, that there was no evidence to establish a statistical pattern of discrimination, fails to even address the question of whether or not there was any special skill or training required for the position occupied by Goldstein, presumably because there was no evidence that there was any such requirement, and even gave lip service to the undisputed axiom that the mere fact that one employee is replaced by another who is younger does not give rise to the inference that age was even considered in the decision to dismiss the first employee.

The Circuit Court chose to couch its decision in language referring to the age disparity between Goldstein and the replacement employee as "circumstantial evidence" when in fact what the Circuit Court was actually saying is that the third prong of the McDonnell/Douglas test could be satisfied by a showing that a terminated employee was replaced by a "substantially younger" employee which in any given situation is essentially a factual question for a jury.

In taking this position, the Circuit Court was adopting the Ninth Circuit's conclusion in *Douglas* v. *Anderson,* 656 F.2d 528 (9th Cir. 1981) and making that substitution of the third prong of the McDonnell/Douglas test its own. It is the belief of Manhattan that such alteration is not only unwarranted under the facts, but it is actually a modification which conflicts with this Court's ruling in McDonnell/Douglas and its progeny. Further, this creates a clear conflict between Circuit Courts which adhere to a strict application of McDonnell/Douglas and Circuit Courts which have modified the test. See, e.g. *Cuddy* v. *Carmen,* 762 F.2d 119 (D.C. Cir. 1985).

In effect, the decision of the Circuit Court has now modified the McDonnell/Douglas test to consist of only three prongs, membership in the protected class, termination, and ability to perform the job at the time of termination. Once this is done, the terminated employee has established a prima facie case, assuming that the jury will find that the replacement employee was "substantially younger"—whatever that means—and the burden of the persuasion, at least to articulate a non-discriminatory reason for termination, shifts to the employer. This is, in effect, placing the burden of proof in an ADEA case upon the shoulders of the employer, and this is a situation which Manhattan would respectfully submit is not only totally unreasonable but is, in fact, in violation of all judicial precedent.

The trend of the Appellate Courts has been to attempt to adapt the standard articulated in McDonnell/Douglas so that rigid application of the test would not prevent an otherwise worthy employee from proving his case because of inflexible and unreasonable criteria. All of the Circuit Courts that have considered the issue have indicated that the McDonnell/Douglas test is not the alpha and omega of proof in an ADEA case or any other case alleging discrimination and have acknowledged that the standards must be flexible enough to adapt to the facts of cases as they are presented, e.g. *Loeb* v. *Textron,* 600 F.2d 1003 (1st Cir. 1979); *Pace* v. *Southern Railway System,* 701 F.2d 1383 (11th Cir. 1983); *Price* v. *Maryland Casualty,* 561 F.2d 609 (5th Cir. 1977). All of these cases, however, have recognized that the basic underpinning of the McDonnell/Douglas test is the fact that proof of all four prongs of the test establishes an inference of

discrimination because the facts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors. See *International Brotherhood of Teamsters* v. *United States,* 431 U.S. 324, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977).

Manhattan acknowledges and agrees that it is not necessary in an ADEA case for an employee to establish a prima facie case using the standard laid down in McDonnell/Douglas and by no other method. Manhattan has no disagreement with the establishment of a prima facie case by statistical evidence, by direct evidence of discrimination or even by circumstantial evidence if the circumstantial evidence which is used is evidence other than application of the McDonnell/Douglas test with a modified third prong. Manhattan believes that if the McDonnell/Douglas standard which requires replacement by an employee outside the protected class cannot be met, then the McDonnell/Douglas method of establishing a prima facie case must be rejected entirely and to substitute a requirement that the replacement employee is "substantially younger" as the third prong does not create circumstantial evidence of discrimination but rather twists the entire allocation of burden of proof from the employee to the employer. Once this is done, then all judicial authority concerning the order of proof in an ADEA case is violated. It is interesting to note that this adulteration of the McDonnell/Douglas test was anticipated in one of the early cases wherein its application to the ADEA was considered. *Loeb* v. *Textron,* supra. In that decision, the First Circuit Court of Appeals noted that in a case which does not fit the mold of McDonnell/Douglas the plaintiff might prove his case by other evidence such as direct evidence of

discriminatory motive or circumstantial evidence *other than* the McDonnell/Douglas elements. *Loeb* v. *Textron,* supra.

As this Court has noted, the shifting burdens of proof set forth in McDonnell/Douglas are designed to assure that the plaintiff has his day in Court despite the unavailability of direct evidence. If direct evidence is available then the McDonnell/Douglas test is inapplicable. *Trans World Airlines, Inc.* v. *Thurston,* 469 U.S. ——, 83 L.Ed.2d 523, 105 S.Ct. —— (1985). In this context, "direct evidence" must refer to not only such things as documentary evidence but also statistical patterns and so forth. If no such "direct evidence" appears then the plaintiff must rely on the McDonnell/Douglas test and in a termination and replacement case the mere proof that the replacement employee was younger in age does not even provide a scintilla of evidence of discrimination.

The ultimate question to be determined in any ADEA case is whether the evidence is sufficient to support the inference of discrimination as alleged by the aggrieved employee. Manhattan believes that replacement of a terminated employee by someone merely "younger" is a false and misleading standard since it fails to recognize what reality and common sense tell us which is that in termination cases older employees are usually replaced by employees that are younger in age. This is a simple fact of life and applies to all areas of employment without exception. The simple fact that an employee is replaced by someone younger than he or she at termination indicates nothing and cannot logically be argued as circumstantial evidence of discrimination.

Once the McDonnell/Douglas test is modified by requiring only that the replacement employee be "substantially younger" the rationale behind the test becomes lost and the new standard, the modified McDonnell/Douglas, fails to withstand the scrutiny of logic and reason. Manhattan recognizes that the McDonnell/Douglas test has undergone a metamorphosis which reflects the need to meet differing factual situations but Manhattan believes that the definition of McDonnell/Douglas as it appears in this case goes beyond evolution and into the creation of a new principle, a principle without authority in law or common sense.

II.

In order to properly interpret the enforcement section of the ADEA, reference must be made to the statutory authority which is granted to the Courts to provide legal or equitable relief as may be appropriate to effectuate the purposes of the Act, the authority to order backpay and back benefits, and the authority to assess liquidated double damages for wilful violations. 29 U.S.C. § 626(b). The equitable relief which is authorized by the statute refers to remedies of reinstatement, compelling employment, promotion and orders of that type while the legal damages are generally held to consist of compensation to the employee for income lost as a result of the termination less income actually received by any replacement employment that occurred between the time of termination and the time of trial. *Rodriguez* v. *Taylor,* 569 F.2d 1231 (3rd Cir. 1977); *EEOC* v. *Detroit Edison Co.,* 515 F.2d 301 (6th Cir. 1975); *Brennan* v. *Ace Hardware Corp.,* 495 F.2d 368 (8th Cir. 1974); *EEOC* v.

Sandia Corp., 639 F.2d 600 (10th Cir. 1980); ***EEOC*** v. ***Enterprise Association Steamfitters Local #638,*** 542 F.2d 579 (2nd Cir. 1976).

The rationale for this set-off which has been almost universally adopted is based upon the recognition of the fact that the enforcement scheme of the ADEA is something of a hybrid combining features of several other federal statutes, but that the underlying policy of the ADEA is to make an aggrieved employee whole and not to grant a "windfall". Further, wrongfully discharged employees have a duty to mitigate their damages. *United States* v. *Lee Way Motor Freight,* 625 F.2d 918 (10th Cir. 1979).

Since the purpose of the ADEA and its remedial scheme is not to create a windfall, even for an employee who has been discriminated against, the courts have almost universally held that pre-judgment interest, damages for pain and suffering, general tort damages or consequential damages for emotional distress, punitive damages and the like are not recoverable in the ADEA case. *Vazquez* v. *Eastern Airlines, Inc.*, 579 F.2d 107 (1st Cir. 1978); *Rogers* v. *Exxon Research and Engineering Co.*, 550 F.2d 834 (3rd Cir. 1977); *Slatin* v. *Stanford Research Institute,* 590 F.2d 1292 (4th Cir. 1979); *Dean* v. *American Secur. Ins. Co.*, 559 F.2d 1036 (5th Cir. 1977).

It appears as though Congress contemplated that its "make whole scheme" of relief might appear to be inadequate if the facts and circumstances of a particular case were particularly egregious and therefore Congress provided for the assessment of liquidated damages equal to double the amount of the lost wages if the discrimination was wilful. This provision

for liquidated damages is clearly designed to compensate a victim of discrimination for damage that is too obscure and difficult of proof for compensation by other means. *Loeb* v. *Textron, Inc.*, 600 F.2d 1003 (1st Cir. 1979); *Rogers* v. *Exxon Research and Engineering Co.*, 404 F.Supp. 324 (D.C.N.J. 1975), vacated on other grounds 550 F.2d 834 (3rd Cir. 1975); *Dean* v. *American Secur. Ins. Co.*, supra; *Fiedler* v. *Indianhead Truckline, Inc.*, 670 F.2d 806 (8th Cir. 1982). In the case at bar, Goldstein was a commission salesman of Manhattan and the Trial Court allowed him to project what his commissions would have been from Manhattan had he continued in their employment and covering a time period from the date of his termination to trial. The Trial Court also allowed Goldstein to prove what he allegedly would have earned from other employers during the same time period if he had not been terminated by Manhattan, these computations being specifically based upon a theory that Goldstein's income would have improved because of his ability to use the Manhattan showroom and because Manhattan was his "headliner" which allowed him an entree to businesses and customers which might not otherwise be available to the other companies that he represented. It is interesting to note that this fact is not borne out by the evidence since Goldstein's income from his other companies increased during the time that he represented Manhattan and other companies while his income from Manhattan decreased, indicating that the Manhattan line was not as popular as the other lines to Goldstein's customers. More importantly, however, by allowing Goldstein to prove this alleged lost income from other companies and to recover that amount from Manhattan, the Trial Court

and the Circuit Court assessed against Manhattan a measure of damages neither contemplated nor allowed under the ADEA. Apparently, this element of assessed damages was deemed to be authorized, in the opinion of the Trial Court and the Circuit Court, as "amounts owing" under 29 U.S.C. § 626(b) which refers to wages, fringe and other job related benefits. Manhattan believes that this statutory construction stretches the definition of "amounts owing" beyond recognition and beyond congressional intent as set forth in the congressional statement of findings and purpose. 29 U.S.C. § 621.

Manhattan believes that this is the first case in which such an element of damages has ever been assessed against an employer and that the precedent established by this case is of such importance and is so violative of the authority granted to the Court by the ADEA that the same must be addressed by this Court and reversed. If the measure of damages allowed by the Trial and Circuit Courts is permitted to stand, then a veritable Pandora's box of claims will be opened. Under a proper analysis and application of the enforcement provisions of the ADEA, it cannot seriously be argued that Goldstein is not fully compensated by receiving an award equal to lost wages or income from Manhattan which was suffered from the time of his termination until the time of trial, with a set-off against that amount of amounts actually earned from others which would reflect his ability to devote more time to other employers and companies that he represented. If Goldstein did, in fact, suffer a loss of his ability to sell products of others because of his inability to use the Manhattan showroom or to use Manhattan as his headliner or entree, then he is

compensated for that fact by the reduced amount of set-off which results from the reduced amount of income received from replacement employment. On the other hand, if Goldstein is allowed to recover for both income lost from Manhattan and projected income lost by virtue of reduced sales for others, then Manhattan is being assessed damages which are directly attributable to companies over which it has no authority or control and Goldstein receives a double recovery which is then compounded with the assessment of liquidated damages.

As noted by Judge Johnson in his dissent in the Circuit Court opinion, the connection between Goldstein's work for Manhattan and his sale of outside lines is simply too tenuous, as an analytic matter, to justify inclusion under the relevant case law. *Blim* v. *Western Electric Co.*, 731 F.2d 1473 (10th Cir. 1984); *Loeb* v. *Textron, Inc.*, supra.

CONCLUSION

Based upon the foregoing the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS, ELEVENTH CIRCUIT.

No. 84-7233.

LAWRENCE GOLDSTEIN,
Plaintiff-Appellee,
Cross-Appellant,

v.

MANHATTAN INDUSTRIES, INC.,
a corporation, *Defendant-Appellant,*
Cross-Appellee.

April 25, 1985.

Discharged employee/salesman brought action against former employer alleging that his employment was terminated in violation of the Age Discrimination in Employment Act. The United States District Court for the Northern District of Alabama, William M Acker, Jr., J., entered judgment in favor of employee, and both employee and employer appealed. The Court of Appeals, Tuttle, Senior Circuit Judge, held that: (1) fact that employee which replaced plaintiff employee was also a member of age group protected by the Act did not preclude plaintiff employee from making out a prima facie case of age discrimination; (2) evidence supported finding that employer violated the Act by discharging employee; (3) commissions which employee lost from noncompeting outside lines were properly recoverable; (4) District Court did not abuse its discretion in ordering remittitur but not new trial; and (5) District Court did not abuse its discretion in conclud-

ing that reinstatement rather than front pay was appropriate remedy.

Affirmed.

Johnson, Circuit Judge, filed opinion concurring and dissenting in part.

Appeals from the United States District Court for the Northern District of Alabama.

Before KRAVITCH and JOHNSON, Circuit Judges, and TUTTLE, Senior Circuit Judge.

TUTTLE, Senior Circuit Judge:

This is an action brought in the Northern District of Alabama by Lawrence Goldstein against his former employer, Manhattan Industries, Inc. ("Manhattan"), alleging that his employment was terminated in violation of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 *et seq.* The employer appeals from a judgment rendered on a jury's verdict for the plaintiff, and the employee cross-appeals from the district court's selection of remedies.

BACKGROUND

A. Goldstein's Discharge

Goldstein took a job with Manhattan Industries as a sales representative for its ladies' shirts and blouses, sold under the "Lady Manhattan" label, in 1960, when he was 38 years old. From that time until his dismissal in 1982 at age 60, Goldstein was Manhattan's exclusive representative in Alabama, Georgia and the Florida panhandle. Much of Goldstein's income was derived from his major store accounts, particularly Rich's and Davison's in Atlanta.

In 1979, Manhattan decided to reorganize its marketing arrangement and decided that sales representatives would no longer sell to the major department stores in their

territories. Instead, those stores were to become "house accounts" administered in the company's New York office. To compensate their sales representatives, such as Goldstein, for the resulting reductions in their income, the company agreed to allow them to represent non-competing apparel lines along with Manhattan's products. After the first year of this arrangement, Manhattan also agreed that Goldstein could display and sell these "outside lines" in Manhattan's permanent showroom in the Atlanta Apparel Mart, so long as he paid the rent and expenses on the showroom.

Subsequently, Goldstein regularly attended seasonal apparel shows in Atlanta and Birmingham. He advertised in trade papers that not only his Lady Manhattan products but also his other lines would be exhibited at his assigned location. Goldstein paid for the advertisements, paid the rent on the Atlanta showroom space at the Atlanta Apparel Mart and paid all charges for exhibition space at other shows. Using Lady Manhattan as his "headliner" and the company's desirable location in the Apparel Mart, Goldstein successfully attracted customers for all of his merchandise.

In 1980, Goldstein generated $1,020,165.83 in sales of Lady Manhattan products despite the loss of the Rich's and Davison's accounts. This was the third highest net sales figure among the company's sales representatives that year. In 1981, Goldstein's sales figure was $830,311.06, fourth highest for the company.[1] Goldstein's earnings from both Manhattan and his outside lines from 1974 to 1983 are set forth in the margin.[2]

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[1] No sales figures are available for years prior to 1980, since the company destroys such records after three years.

[2]

Year	Manhattan Industries	Outside Lines
1974	$41,037.46 (including reimbursed expenses of $9,000)	

Apparently the Lady Manhattan division was in a shaky financial condition from 1979 to 1981. The plan to handle major store accounts from the New York office proved ill-conceived. Moreover, Goldstein testified that the company produced a poor product line during those years. Sales were down nationally.

In early 1982, Bob Guberman, age 41, and Preston Imber, age 39, took over management of the Lady Manhattan division, Guberman as vice president and Imber as national sales manager. They apparently determined to phase the exclusivity requirement back in and selected six sales territories, including Goldstein's, in which the sales representatives would be required to abandon their outside lines. According to Imber, 12 territories had been returned to exclusivity by the end of 1983 and all of the sales representatives in those territories had received back their major accounts. Eight territories situated in various parts of the United States remained non-exclusive.

On March 3, 1982, Guberman traveled to Florida to interview applicants for sales representative positions. On

Year	Manhattan Industries	Outside Lines
1975	$66,102.19 (including reimbursed expenses of $2,250)	
1976	$57,295.55	—
1977	$52,085.98	—
1978	$78,496.32	—
1979	$59,660.37	$4,377.00
1980	$44,590.02	$32,837.00
1981	$49,744.46	$53,687.00
1982	$15,834.27	$34,126.00
1983	—	$38,712.22

Thursday, March 4, he stopped in Atlanta to meet with representatives of Rich's and Davison's and to interview Michael Eiseman, age 46, as a possible replacement for Goldstein. He called Eiseman up at 11:00 p.m. and told him to come to an interview at 11:30 p.m. at the Hyatt Regency Hotel in Atlanta. Eiseman had previously applied for the position and had met with Guberman in New York in February.

At 8:00 the same evening, Guberman called Goldstein at his home in Birmingham, Alabama, to tell him that the company would no longer permit Goldstein to sell outside product lines and that it expected him to return to an exclusive basis. Guberman told him that sales representatives who returned to exclusivity would be assured a $25,000 yearly salary plus a $25,000 draw, or advance, against future commissions.

Goldstein insists that Guberman said nothing about returning the Rich's and Davison's accounts to Goldstein and that Guberman in fact said they would remain house accounts. Guberman, however, contends that he did offer to return these accounts to Goldstein and that such an offer would have been consistent with the company's policy of returning the major accounts to the sales representatives.

Goldstein telephoned Guberman in New York on Monday, March 8, with a counter-proposal, whereby Goldstein's nephew would take over primary responsibility for the outside lines. He suggested trying this out on a season-to-season basis. Goldstein claims that in that conversation he protested to Guberman that it was unfair for the company to ask him to give up his outside lines without receiving the Rich's and Davison's accounts in return.

Guberman rejected Goldstein's proposal by certified letter dated March 11, which was not received by Goldstein until March 15. The letter restated Guberman's position

that Goldstein would have to give up his outside lines, but said nothing about the major store accounts.[3]

Two earlier drafts of this letter were introduced. In a handwritten draft, apparently prepared on March 8 or 9, Guberman referred to substandard sales figures in Goldstein's territory. He then continued, "Your present target for the fall 82 season is $350,000. Excluding Richs & Davidsons." Guberman testified that the major stores were ex-

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[3] Guberman's letter read as follows:

March 11, 1982

Dear Larry:

As a follow-up to our conversation in Atlanta last Thursday, 4th, I must now ask you to again advise me of your intentions. At that time you were told of Lady Manhattan's plans to re-organize its sales force. I offered to you, as I have to other multiple line representatives, the option of a $25,000 draw (against commission) in a addition to a $25,000 salary to represent Lady Manhattan on an exclusive basis only and discontinue carrying any other lines. You declined this offer at that time and on Monday, March 8th, in a phone conversation, you asked me to reconsider my decision and keep you on a "season to season" basis predicated on a substantial increase in your sales figures.

Apparently, Larry, you missed the point of our initial conversation. Our goal is to restructure the sales force and return to our former policy of exclusivity. I believe that a return to this policy will be an important factor toward building back the position that Lady Manhattan once enjoyed. And, Larry, as a long time employee of Lady Manhattan, who previously functioned in that same manner, you can well understand it's effectiveness.

Therefore after reconsidering your suggestion I must again ask for your immediate reply.

Yours truly,

s/Bob Guberman

cluded from the target figure because the projections for those accounts were as yet unknown.

A typed draft of a letter dated March 10 did not describe the company's offer or refer to poor sales in Goldstein's territory.

Meanwhile, the company had deleted Goldstein's name from the official brochure for its 1982 fall fashion season, which was mailed to 6,830 customers on March 9 and 10, including 245 in Goldstein's territory. The brochure listed other sales representatives by name. Goldstein's name had been included on the 1981 brochure.

On March 12, 1982, Guberman wrote a letter to Goldstein advising him that his employment would be terminated effective March 15. The letter was not mailed until March 15. By that time Guberman had already hired Eiseman to replace Goldstein. Eiseman was to be an exclusive sales representative for Lady Manhattan in Goldstein's territory, and he was also to receive the Rich's and Davison's accounts.

Goldstein did not receive Guberman's March 11 letter until March 15. He sent an immediate mailgram accepting the company's offer. When Guberman received the mailgram agreeing to his terms, he apparently rescinded Goldstein's March 15 termination and withdrew his offer to hire Eiseman.

Goldstein had not received the termination letter before he set out for New York for a company sales meeting, scheduled for March 19, 1984. At the conclusion of the sales meeting, Goldstein met with Guberman and Imber. Goldstein recalled that other salesmen had informed him that, while they had returned to exclusivity, they had also had their major accounts returned to them. He stated that in his meeting with Guberman and Imber, he complained that he was not being given the same consideration as other salesmen, whereupon Guberman became angry, ac-

cused Goldstein of never intending to accept the job and told Goldstein that he was fired.

Guberman and Imber, on the other hand, recalled that Goldstein, having been assured that he would receive back the Rich's and Davison's accounts, nevertheless informed them that he had decided he was not going to give up his outside accounts. He adhered to this position even after he had a telephone conversation with company chairman Lawrence C. Leeds, Jr. Leeds also testified that it was clear in his conversation with Goldstein that Goldstein understood he was to get back the Rich's and Davison's accounts. When Goldstein refused to commit himself to exclusivity, Guberman became irritated and terminated Goldstein's employment.

When Goldstein returned home to Birmingham, he found Guberman's March 12 letter of termination waiting for him.

Goldstein filed a charge with the Equal Employment Opportunity Commission ("EEOC") on June 21, 1982, alleging that his discharge and replacement with Michael Eiseman violated the ADEA. This suit followed on October 5, 1982.

B. Plaintiff's Evidence of a Pattern of Discrimination

Goldstein introduced evidence concerning the termination and replacement of other sales representatives. The evidence focused on a number of sales representatives who were replaced in 1982.

In March 1982, Robert Autenrieth, age 52, with 28 years of service, was replaced by Stan Blackman, age 43.

In September 1982, Milton Ran, age 53, was replaced by a Mr. Wein, age 48, who was in turn replaced by a Mrs. Norris, also age 48.

In March 1982, M. Berger, in his 40's, was replaced by Mr. Root, age 30.

In July 1982, Stan Ross, age 60, was replaced by a Mr. Rosenberg, age unknown.

In March 1982, W. Stepka, whose age was estimated at 33, was replaced by Mr. Platt, age 43.

In the same month, R. Castillo, who may have been 35, was replaced by Mr. Horowitz, age 38. Horowitz, in turn, was replaced by Mr. Goodman, age 38, who was himself replaced in June 1983 by Ms. Stein, age 25.

In July 1983, R. Queal, age 36, died and was replaced by Mr. Wooten, age 28, and Mr. Norman, age 43.

There was also evidence that W. Graves, age 50-60, was replaced by Mr. Platt, age 43, and Mr. Blackman, age 45.

The plaintiffs also introduced over defendant's objection a list of all sales representatives employed[4] by Manhattan from 1976 until the time of trial, including ages, dates of hire and dates of termination.[5] The list revealed a fairly

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[4] Many of the company's sales representatives, including some of those named above, were independent agents rather than employees of Manhattan. Goldstein was an employee.

[5] The employer objected to the introduction of this list, which it had prepared in response to an interrogatory, on the ground that it was irrelevant and legally insufficient to constitute statistical evidence of discrimination. We conclude that, while this list would certainly have been inadequate to support a statistical case of age discrimination, it was at least relevant to the issue of whether there was a pattern of replacing older sales representatives with younger ones in 1982 and 1983, as Goldstein alleged. It was not an abuse of discretion to admit it and to make it available to the jury. Indeed, since, on balance, the list appears to negate the existence of such a pattern, we can hardly see how the employer was prejudiced by its introduction.

high turnover during the years in question. Two employees over 50, Goldstein and Autenrieth, were shown to have been terminated in 1982. Two others, Robert Hone, and William Bennett, were shown to have been kept on from 1979 through 1983. The average age of employed sales representatives increased from 37.3 in 1979 to 41.7 in 1983. There was a slight decline from 1981, when the average age was 41, to 1982, when it was 40.6.

C. Lost Earnings

Goldstein testified that, although he continued to sell his outside lines after his discharge, the Lady Manhattan line had been his "entree" with his customers, and that his inability to offer Lady Manhattan products after March 1982 adversely affected the saleability of his other lines. Moreover, the sales of all his lines had benefited from the choice location of the Manhattan space at the Atlanta Apparel Mart. After his termination, Goldstein was forced to move to another location which was far less desirable.

The plaintiff's expert, Dr. George Ignatin, an economics professor, estimated that Goldstein's net lost earnings from both Manhattan and his outside lines since his termination totalled $147,300. Dr. Ignatin's projections of Goldstein's lost earnings from Manhattan were based on his earnings in 1980, 1981 and 1982. He assumed that Goldstein would not have had the Rich's and Davison's accounts if he had remained with the company.

D. The Judgment Below

In his closing argument, Goldstein's counsel asked the jury to find that Goldstein had suffered lost earnings in the amount calculated by Dr. Ignatin, $147,300. The jury returned with a verdict for Goldstein, answering the following special interrogatories in the affirmative:

1. Do you find that age was the determining factor in the decision of the employer to terminate the employee?

2. If the answer to question no. 1 is yes, do you find that the act of discrimination was willful as defined to you by the court?

The jury also awarded Goldstein $175,000 for lost wages and benefits. The district court subsequently ordered a remittitur to reduce the jury's award down to $147,300, to conform with the findings of Dr. Ignatin. Because the jury had found willfulness, the court awarded liquidated damages in an amount equal to the reduced award. The court also ordered Goldstein's immediate reinstatement to his former position, despite Goldstein's contention that this was a proper case for an award of front pay in lieu of reinstatement.

ISSUES

1. Whether as a matter of law Goldstein was unable to establish a prima facie case of age discrimination because his replacement was also within the age group protected by the ADEA;

2. Whether Goldstein was entitled to recover as lost earnings reductions in his income from the outside lines;

3. Whether the evidence was sufficient to support the jury's finding of discrimination;

4. Whether the excessiveness of the jury's damage award, which was reduced by remittitur, required that the entire verdict be set aside,

5. Whether the district court abused its discretion in ordering Goldstein's reinstatement instead of awarding him front pay.

DISCUSSION

A. The Prima Facie Case

The protections of the ADEA are limited to persons between the ages of 40 and 70. 29 U.S.C. § 631(a). This Circuit has adopted a variation if the four-part test articulated in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973) as the standard method of establishing a prima facie case of age discrimination:

> In order to establish a prima facie case of discrimination under this test, a plaintiff must prove (1) that he is a member of the protected group; (2) that adverse employment action was taken against him, *e.g.* discharge, demotion, failure to hire; (3) *he was replaced by a person outside the protected group;* and (4) he was qualified for the position for which he was rejected. [Emphasis added.]

Pace v. Southern Railway System, 701 F.2d 1383, 1386 (11th Cir.), *cert. denied*, —— U.S. ——, 104 S.Ct. 549, 78 L.Ed.2d 724 (1983); *Price v. Maryland Casualty Co.*, 561 F.2d 609, 612 (5th Cir.1977).

Manhattan argues that, since this is a replacement case, Goldstein could make out a prima facie case of age discrimination only if he was replaced by a person under 40. Since Eiseman was 46 years old at the time he replaced Goldstein, the employer contends that Goldstein failed as a matter of law to prove his prima facie case.

This Court has repeatedly cautioned against an overly strict application of the *McDonnell Douglas/Price* test, noting that it is "not the alpha and omega of possible tests in the age discrimination context." *Pace*, 701 F.2d at 1387; *McCorstin v. United States Steel Corp.*, 621 F.2d 749, 753 (5th Cir.1980). A mechanistic approach in the

selection of criteria necessary to prove a prima facie case of age discrimination is frequently inappropriate because it ignores the basic realities of this form of discrimination. Age discrimination is qualitatively different from race or sex discrimination in employment, because the basis of the discrimination is not a discreet and immutable characteristic of an employee which separates the members of the protected group indelibly from persons outside the protected group. Rather, age is a continuum along which the distinctions between employees are often subtle and relative ones. Nevertheless, age differences may be very real distinctions from the perspective of an employer, for whom an employee's age is a constantly shifting factor in the determination of his worth to the company. As this Court observed in *McCorstin:*

> Seldom will a sixty-year-old be replaced by a person in the twenties. Rather, the sixty-year-old will be replaced by a fifty-five-year-old, who, in turn, is succeeded by a person in the forties, who also will be replaced by a younger person. Eventually, a person outside the protected class will be elevated but rarely to the position of the one fired. . . .
>
> . . . . .
>
> [B]ecause the discrimination involves age, rather than sex or race, a requirement that the replacement be from a nonprotected group fails to take the reality of the working place into account. Because of the value of experience rarely are sixty-year-olds replaced by those under forty. The replacement process is more subtle but just as injurious to the worker who has been discharged. That the person is replaced by a person ten years younger rather than twenty years does not diminish the discrimination; the subtlety only tends to disguise it.

621 F.2d at 754.

The mere fact that one employee is replaced with another who is younger certainly does not, without more, give rise to an inference that age was even considered in the decision to dismiss or demote the first employee. Historical experience does often lend support to suspicions that replacements of black with whites or women with men are not coincidental. However, whenever employees are replaced, their replacements are invariably either older or younger than they are, and the distinctions are usually unimportant.

Congress recognized this fact when it concluded that the protections of the ADEA should be limited to persons over 40, since historically it has been within this age group that employees have been displaced largely on account of their age because of the perceived decline in their long-range value to their employers. The *McDonnell Douglas/Price* test simply reflects a similar recognition that it is more likely in the ordinary nature of things that age played a part in a decision to replace an employee when his replacement is younger than 40 than when the replacement is himself within the protected age group.

Whether a prima facie case of discrimination has been shown in any given situation is essentially a factual question. The inquiry is whether an ordinary person could reasonably infer discrimination from the facts shown if those facts remain unrebutted. *See McCorstin,* 621 F.2d at 754. While the *McDonnell Douglas/Price* test is an approved method of making a prima facie case, this Court has considered alternative proofs where a *McDonnell Douglas/Price* analysis was plainly inappropriate. Such is the case in reduction-in-force situations, where replacement is simply not in issue. *See McCuen v. Home Insurance Co.,* 633 F.2d 1150, 1151 (5th Cir., Unit B, 1981); *McCorstin,* 621 F.2d at 754.

In *Pace,* we identified other situations where a prima facie case of age discrimination could be established with-

out showing that the plaintiff was replaced by a person under 40. We determined that a prima facie case could, for example, be made with statistical proof of a pattern of discrimination against older employees. 701 F.2d at 1388. We also noted the Ninth Circuit's conclusion in *Douglas v. Anderson*, 656 F.2d 528 (9th Cir.1981) that the discrimination prong of the prima facie case could be established by a showing that a plaintiff "was replaced by a substantially younger employee with equal or inferior qualifications." *Id.* at 533. We observe that, in *Douglas*, there had also been substantial evidence of the plaintiff's qualifications. *Pace*, 701 F.2d at 1390.

In *Pace*, we were confronted with a 51-year-old employee who had been demoted and replaced by another employee who was 49 years old. There was considerable evidence that the demoted employee was not qualified for the position from which he had been demoted. He attempted to rely on statistical evidence showing that other reassignments made at approximately the same time reflected a pattern of age discrimination. He also presented evidence of the percentage of persons within the protected age group among employees who were promoted and among those who were demoted during various time periods. This Court concluded that the evidence of the reassignments simply did not indicate a pattern of discrimination, particularly since the plaintiff was the only employee, whether in or out of the protected group, who had been demoted. As to the percentages, we found that the plaintiff had failed to relate those percentages to the percentage of protected workers in the work force as a whole. 701 F.2d at 1388-89.

We believe that the statistical evidence proffered by Goldstein concerning other sales representatives is only slightly more convincing than the statistics relied upon in *Pace*. The evidence showed that four other sales representatives in the protected age group were replaced by

persons younger than themselves. Some of those replacements were within the protected age group, but others were not. However, the evidence also indicated that three sales representatives younger than 40 were replaced by persons older than themselves. One other employee within the protected age group was replaced by a person whose age was unknown. As for the list of sales representatives employed by the company with ages, dates of hire and dates of termination, the lists simply did not demonstrate any sort of a "youth movement," whereby the company sought to enhance its image with its customers by utilizing younger sales representatives. It may well have been that age played a part in some of the company's employment decisions. However, there is simply no evidence that this was a widespread practice. Thus, we conclude that the statistical evidence proffered by Goldstein does not satisfy the discrimination prong of his prima facie case.

We do, however, believe that there is sufficient circumstantial evidence surrounding his own discharge to support a reasonable inference that he was discharged at least in part because of his age. In the first place, Goldstein was replaced by a person who was 14 years younger than he was. Thus, the discrepancy between the age of the replaced employee and the age of the replacing employee was far more substantial here than in *Pace,* where the replacing employee was only two years younger than the plaintiff. As noted in *McCorstin,* it is likely that, in choosing a replacement for a 60-year-old employee who is determined to be too old to continue with the company, the employer would select someone who has a more appropriate balance of age and experience, and that only someone who is over 40 years old is likely to have had the sort of experience to enable him to fill the position vacated by the 60-year-old. *See id.,* 621 F.2d at 754.

Moreover, the evidence is overwhelming that Goldstein was highly qualified for his position. Up until the end of

his employment, he was apparently one of Lady Manhattan's most successful sales representatives, even when he was devoting part of his efforts to non-competing outside lines. *Cf. Douglas*, 656 F.2d at 533.

Finally, Goldstein has presented direct evidence that he was singled out for disparate treatment. While it may well be true that Guberman and Imber planned a phased return to exclusivity regime and that Goldstein's territory was one of six selected for immediate exclusivity, the jury could have accepted Goldstein's evidence which indicated that he was the only sales representative marked for exclusivity who was not offered back his major accounts.

These facts convince us that Goldstein presented sufficient evidence to satisfy the discrimination prong of his prima facie case of age discrimination even though the employee who replaced him was himself within the protected age group.

B. Sufficiency of the Evidence

In ascertaining whether the evidence was sufficient to support the jury's verdict, we inquire whether, in light of all the evidence, reasonable persons could, under any theory submitted to the jury, have resolved the dispute as the jury did. *Thompson v. Bass*, 616 F.2d 1259, 1267 (5th Cir.), *cert. denied sub nom. Thompson v. Turner*, 449 U.S. 983, 101 S.Ct. 399, 66 L.Ed.2d 245 (1980). We may not reweigh the evidence to reach our own conclusions about the correctness of the jury's decision. *Id.*

As noted previously, Goldstein introduced sufficient prima facie evidence of discrimination to warrant the submission of the case to the jury. This imposed on Manhattan the burden of articulating a legitimate non-discriminatory reason for Goldstein's discharge. *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 254, 101

S.Ct. 1089, 1094, 67 L.Ed.2d 207 (1981); *Horn v. Bibb County Commission,* 713 F.2d 689, 691 (11th Cir. 1983). Manhattan did this by claiming that Goldstein was fired, not because of his age, but because of his refusal to return to an exclusive status.

The burden thus returned to Goldstein to prove by a preponderance of the evidence that age discrimination was a reason for his discharge. He may do this "either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." *Burdine,* 450 U.S. at 256, 101 S.Ct. at 1095; *Horn,* 713 F.2d at 691.

Goldstein presented both testimonial and documentary evidence that, unlike other sales representatives who were required to return to exclusive status, he alone was not offered the major store accounts in his sales territory. Guberman and Imber both testified that the company's policy was to return the major store accounts to the sales representatives. They and Leeds all testified that they believed this offer had been extended to Goldstein as well. Guberman did acknowledge that Goldstein raised the issue of the major stores during his telephone conversations with Guberman on both March 4 and March 8.

Goldstein, however, testified that Guberman never offered to return the major accounts to him, despite Goldstein's protestations that a return to exclusivity without those accounts was unfair. Moreover, Guberman's letter of March 11, which detailed the terms of his offer, said nothing about Rich's and Davison's. It only referred to the proposed $25,000 salary/$25,000 draw arrangement. Guberman's only written reference to the major accounts appears to have been the handwritten draft in which he gave Goldstein a target sales figure exclusive of Rich's and Davison's.

While Guberman insisted that this was simply a reference to the fact that the projections for those stores were not yet available, the jury was certainly entitled to draw the contrary inference that the language in the draft was a reiteration of a previously stated position that Rich's and Davison's were not included in the offer. Likewise, in view of Goldstein's clear concern about the Rich's and Davison's accounts, the jury was entitled to infer that those accounts would have been mentioned in the March 11 letter if in fact they were to be included in Guberman's offer.

The jury was also entitled to view other actions on the employer's part as casting doubt on the genuineness of its advanced reason for Goldstein's termination. Guberman was already sounding out Goldstein's replacement, Eiseman, the same night that he informed Goldstein that Goldstein would have to return immediately to an exclusive status. Moreover, the exclusion of Goldstein's name from the company's official brochure for the fall fashion season, which was distributed to customers on March 9 and 10, was evidence from which the jury could conclude that, at the very least, a decision had been made to discharge Goldstein at some time prior to the March 8 conversation and probably even before the March 4 conversation.

The employer offered explanations for all of these actions, which were not directly rebutted. The jury was not required to accept these explanations but was entitled to draw its own conclusions from the documents or actions in question.

Finally, there was little, if any, evidence that Goldstein's performance as a sales representative for Manhattan was less than satisfactory. The jury could find that such dissatisfaction as Guberman and Imber may have had with his sales in 1980 and 1981 were attributed to his non-exclusive status.[6] The only reason they gave for his discharge

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[6] In a letter to the company's attorneys, dated July 26, 1982, Don-

was his refusal to return to exclusivity under terms which the jury implicitly found to be discriminatory. They replaced a man who had 22 years with the company and one of its most successful sales records with another man 14 years younger who had no experience with Lady Manhattan.

We believe that there was sufficient evidence from which a reasonable jury could have concluded that the reason articulated by the employer for Goldstein discharge was a pretext for discrimination and that Goldstein's age was a consideration in the decision to terminate him. We thus affirm the jury's finding of discrimination.

C. Recovery of Lost Earnings from Outside Lines

Manhattan next contends that its back pay liability should be limited to his lost income from Manhattan and should not include earnings which he may have lost from his outside lines as a result of his termination. Manhattan observes that only $96,700 of the $147,300 calculated by Dr. Ignatin represents lost income from Manhattan and submits that this figure should be offset by actual earnings of $73,000, leaving a maximum liability of only $23,700.

Whether Goldstein is precluded as a matter of law from recovering his lost earnings from his outside lines depends on whether those earnings are in the nature of compensatory or general damages or are instead job-related benefits which would be recoverable as part of a back pay award.

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ald Kallman, Manhattan's vice chairman of the board and executive vice president, claimed that Goldstein "was discharged for poor performance and not age discrimination." Because of the clear inconsistency between this letter and the company's stated reason for Goldstein's discharge, the company insists that Kallman's letter does not reflect the company's true position.

We note that, while the ADEA does refer to the availability of "such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter," 29 U.S.C. § 626(b), this Court has held that this provision is to be read in light of the reference to the remedies provided under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 216 and 217, and that neither punitive damages nor compensatory damages for pain and suffering are recoverable under the ADEA. *Dean v. American Security Insurance Co.*, 559 F.2d 1036, 1038 (5th Cir.1977), *cert. denied*, 434 U.S. 1066, 98 St.Ct. 1243, 55 L.Ed.2d 767 (1978).

However, back wages are ordinarily recoverable, *see Hodgson v. First Federal Savings & Loan Association*, 455 F.2d 818, 825 (5th Cir.1972), as are fringe benefits. *See, e.g., Blackwell v. Sun Electric Corp.*, 696 F.2d 1176, 1185-86 (6th Cir.1983). This is clear from the House Conference Report attached to the 1978 amendments to the ADEA, which construes the "amounts owing" under 29 U.S.C. § 626(b) as including "items of pecuniary or economic loss such as wages, fringe, and other job-related benefits." H.R.Conf.Rep. No. 95-950, 95th Cong., 2d Sess. 13, *reprinted in* 1978 U.S. Code Cong. & Ad.News, 504, 528, 535.

We note that this Court has held that a Title VII plaintiff is entitled to recover such lost work benefits as constitute "concomitants of employment." *Walker v. Ford Motor Co.*, 684 F.2d 1355, 1364 (11th Cir.1982). We believe that a similar criterion is appropriate in determining whether a particular economic loss occasioned by an ADEA violation is recoverable under that Act.

Whether a particular economic benefit is a concomitant of the employment relationship depends on the contemplation of the parties when they agreed upon the terms and conditions of employment. In this case, Manhattan agreed that non-exclusivity was to be one of the terms and conditions of Goldstein's employment following the withdrawal of the major store accounts. Clearly the commis-

sions which Goldstein might earn from the representation of non-competing outside lines were contemplated as a substitute for the commissions which Manhattan was saving by taking back the accounts with Rich's and Davison's. Moreover, Manhattan had agreed that Goldstein could sell his outside lines from Manhattan's showroom at the Atlanta Apparel Mart.

We believe that the right to sell non-competing outside lines and to use the Lady Manhattan line as a "headliner" or "entree" with which to attract buyers to the other lines was clearly a concomitant or fringe benefit of Goldstein's employment. Thus, the commissions which he lost from these lines, if provable with reasonable certainty, were properly recoverable.

Manhattan insists that the lost earnings from the other companies were too remote and speculative to form the basis of an award. We do not agree. Goldstein introduced evidence of his earnings history from three specific companies whose products he had sold alongside his Lady Manhattan line. Dr. Ignatin applied the same method of projecting anticipated earnings from these companies as he did with the lost earnings from Manhattan. Since the base figures represented earnings which depended on the availability of the Lady Manhattan line as a "headliner," the projections thus estimated what Goldstein would have earned from his outside lines had he been permitted to stay on with Manhattan on a non-exclusive basis. Thus, we conclude that the amount calculated by Dr. Ignatin was a reasonably certain and reliable estimate of the earnings which Goldstein lost from his outside lines as a result of his discharge from Manhattan.

As a preliminary matter, we believe that Goldstein was entitled to claim damages based on his pre-termination earnings. He had two possible measures of lost earnings: projections based on his actual earnings prior to discharge or the earnings which he would have received had the com-

pany made him the same offer that the other sales representatives received. The first included the outside accounts but not Rich's and Davison's. The second would have included the major accounts but not the outside ones.

Under the facts of this case, we believe that either of these alternatives was an appropriate measure of damages. The jury found that Goldstein had been discharged because of his age. This conclusion required a finding that Goldstein's version of Guberman's offer was correct—a return to exclusivity but without the major accounts.

The company could have made either of two non-discriminatory offers: to continue under the existing non-exclusive arrangements or to return to exclusivity with the major accounts. In fact, neither of these options was offered. Both are hypothetical and the jury was not required to conclude that the second was the only non-discriminatory alternative which would have been available to Goldstein. Instead, it was entitled to find that Goldstein would have been kept on under the existing arrangement if the company had wanted to keep him at all. At that time, 14 territories remained non-exclusive, and eight were still non-exclusive in 1984. Thus, we believe it was proper to measure Goldstein's damages on the basis of a hypothetical continuation of his pretermination earnings.

D. Excessiveness of the Jury's Award

The employer contends that the jury's award of $175,000 to Goldstein so substantially exceeded the evidence of damages as to demonstrate that the jury was governed by passion and prejudice in reaching its verdict. It thus insists that a remittitur reducing the award to the maximum established by the evidence was insufficient to cure the prejudice resulting from a "runaway" jury.

It is true that a grossly excessive award may warrant a finding that the jury's verdict was swayed by passion

and prejudice and thus necessitate a new trial. *See Edwards v. Sears, Roebuck & Co.*, 512 F.2d 276, 283 (5th Cir. 1975). However, a new trial should be ordered only where the verdict is so excessive as to shock the conscience of the court. *Thompson v. National Railroad Passenger Corp.*, 621 F.2d 814, 827 (6th Cir.), *cert. denied*, 449 U.S. 1035, 101 S.Ct. 611, 66 L.Ed.2d 497 (1980); *Williams v. Steuart Motor Co.*, 494 F.2d 1074, 1085 (D.C.Cir.1974); *Massachusetts Bonding & Insurance Co. v. Abbott*, 287 F.2d 547, 548 (5th Cir.1961). Whether a new trial is required is within the sound discretion of the district court, and a refusal to grant a new trial will not be overturned unless there has been a clear abuse of discretion. *Hedrick v. Hercules, Inc.*, 658 F.2d 1088, 1095 (5th Cir., Unit B, 1981).

The district court considered the jury's verdict in light of all the evidence and concluded that the excessiveness of the award warranted a remittitur but not a new trial. We do not believe this was an abuse of discretion. The award exceeded the specific proofs by approximately 20 percent. However, Dr. Ignatin emphasized repeatedly that he considered his estimates of Goldstein's lost earnings to be on the conservative side and that Goldstein's damages may have been greater. In light of this, we do not believe that the admitted excessiveness of the jury's award reflects improper passion or prejudice or that it shocks the conscience.

In general, a remittitur order reducing a jury's award to the outer limit of the proof is the appropriate remedy where the jury's damage award exceeds the amount established by the evidence. *See Howell v. Marmpegaso Compania Naviera, S.A.*, 536 F.2d 1032, 1034-35 (5th Cir. 1976); *Natco, Inc. v. Williams Brothers Engineering Co.*, 489 F.2d 639, 641 (5th Cir.1974).

This is not a case where a jury could have found liability on more than one count, each of which involved different elements of damages, and failed to indicate on which basis

it found liability. In such a case, an excessive damage award may require a new trial on both liability and damages. *Jamison Co. v. Westvaco Corp.*, 526 F.2d 922, 935 (5th Cir.1976). Where, however, there is only one basis for liability alleged, then all of the damages evidence relates to that count and the trial court may base a remittitur order on the maximum amount proved. This is precisely what the district court did. We thus affirm the order of a remittitur in lieu of a new trial.

E. The Reinstatement Award

Goldstein contends that the district court abused its discretion in ordering his reinstatement with Manhattan and denying an award of front pay in lieu of reinstatement.

Goldstein argues that reinstatement is an inappropriate remedy in this case for several reasons. Chiefly, he argues that the litigation of this suit has engendered such ill feeling between himself and the persons who would be his immediate superiors in the company that it would be impossible for him to function as an employee of Manhattan again. He also contends that his sales activities since his discharge have been in other types of women's apparel and that he has lost touch with most of the buyers with whom he dealt when he was representing Lady Manhattan.

On the other hand, Imber, who, as Lady Manhattan's national sales manager, would be Goldstein's immediate boss, testified that he would be willing to have Goldstein return as an exclusive salesman with the major accounts included. He foresaw little difficulty in re-establishing Goldstein's contacts with Lady Manhattan's accounts in view of his time in the territory.

It is clear from the language of the ADEA's enforcement provision, that reinstatement is the preferred remedy for discriminatory discharge:

> [T]he court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this [Act], including without limitation judgments compelling employment, reinstatement or promotion. . . .

29 U.S.C. § 626(b).

The determination of whether reinstatement is an appropriate remedy lies within the sound discretion of the district court. *Hedrick v. Hercules, Inc.*, 658 F.2d 1088, 1095 (5th Cir., Unit B, 1981). More generally, the selection of remedies for an ADEA violation is a matter of the trial court's discretion, so long as the relief granted is consistent with the purposes of the Act. *Leftwich v. Harris-Stowe State College*, 702 F.2d 686, 693 (8th Cir.1983).

This Court has expressly held that an award of front pay—*i.e.*, prospective lost earnings—may be an appropriate remedy in an age discrimination suit because reinstatement would be impracticable or inadequate. *O'Donnell v. Georgia Osteopathic Hospital, Inc.*, 748 F.2d 1543, 1551 (11th Cir.1984). *See, also, EEOC v. Prudential Federal Savings & Loan Association*, 741 F.2d 1225, 1231 (10th Cir.1984); *Gibson v. Mohawk Rubber Co.*, 695 F.2d 1093, 1100 (8th Cir.1982); *Cancellier v. Federated Department Stores*, 672 F.2d 1312, 1319 (9th Cir.), *cert. denied*, 459 U.S. 859, 103 S.Ct. 131, 74 L.Ed.2d 113 (1982). *But see Kolb v. Goldring, Inc.*, 694 F.2d 869, 874 n. 4 (1st Cir.1982) (no recovery under ADEA for future economic loss).

Front pay may be particularly appropriate in lieu of reinstatement where discord and antagonism between the parties would render reinstatement ineffective as a make-whole remedy. *See Cancellier*, 672 F.2d at 1319.

Since, as stated, the selection of remedies is discretionary with the trial court, we find no abuse of discretion in the district court's conclusion that reinstatement rather

than front pay was the appropriate remedy in this case. We believe the district court was entitled to rely on Imber's testimony that he would be willing to have Goldstein back and that Goldstein would be able to function effectively as Lady Manhattan's sales representative in his old territory.

We note that the order of reinstatement directed that Goldstein be rehired as Manhattan's exclusive sales representative in Alabama, Georgia and the Florida panhandle, and that Manhattan was to maintain no "house accounts" in that territory. The order further provided that the reinstatement was to "be on terms and conditions as advantageous to plaintiff as those terms and conditions between defendant and defendant's present sales representatives having comparable sales territories." In addition, Manhattan was ordered to restore to Goldstein all pension benefits to which he would have been entitled if he had not been terminated.

We conclude that the district court's reinstatement order coupled with the damages award for lost earnings will make Goldstein substantially whole. We thus affirm the reinstatement order and the denial of front pay in lieu thereof.

AFFIRMED.

JOHNSON, Circuit Judge, concurring in part and dissenting in part:

Although I concur in all other parts of the majority opinion, I must dissent from that section which holds it appropriate to include in compensatory damages the decrease in "outside earnings" that Goldstein suffered following his termination by Manhattan. The connection between Goldstein's work for Manhattan and his sale of "outside" lines is too tenuous, as an analytic matter, to justify inclusion under the relevant case law. *See Blim v. Western Electric Co.*, 731 F.2d 1473 (10th Cir.1984); *Loeb v. Textron, Inc.*, 600 F.2d 1003 (1st Cir.1979) (demonstrably close connection required). The simple fact that Manhattan gave Goldstein the *opportunity* to undertake "outside" sales does not render his income from this activity a fringe benefit of his employment with Manhattan. A benefit can be described as concomitant or fringe only to the extent that it derives directly from some feature of Goldstein's employment with Manhattan. Such a connection might be established by the fact that Manhattan permitted Goldstein to use its name and showroom to bring in customers whom he could then interest in his "outside" lines. But the record demonstrates that these benefits had a smaller role in Goldstein's sale of "outside" lines than Goldstein suggests. In the last years of Goldstein's nonexclusive contract, for example, his sales in "outside" lines rose substantially while his sales in Manhattan products decreased. This suggests that the outside lines were more attractive to many customers than the Manhattan lines, and that the Manhattan products may not have been the factor that encouraged customers to buy from Goldstein. And while Goldstein used a Manhattan showroom to exhibit his other products, his ability to obtain another showroom for his fall show when he was terminated by Manhattan demonstrates that this factor was not determinative either.

Even beyond the tenuousness of the connection, it would be impossible to document the decrease in "outside earnings" with the precision which has been demanded by the courts in this area of the law. *Compare Kolb v. Goldring, Inc.*, 694 F.2d 869 (1st Cir.1982) (decrying speculative damages and excluding benefits incapable of precise valuation), *with Kelly v. American Standard, Inc.*, 640 F.2d 974 (9th Cir.1981) (including benefits capable of precise calculation). Because this "outside income" can only be described as a fringe benefit of employment to the extent that it was earned because of the resources or facilities that working for Manhattan made available to Goldstein, what would have to be documented is not simply the decrease in "outside earnings", but the *decrease attributable to the fact that Goldstein could no longer use Manhattan's name, showroom or products to attract potential buyers to his "outside" lines.* The impossibility of documenting this portion of lost income with any precision demonstrates that it is too speculative to be included within the category of lost benefits.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 84-7233

LAWRENCE GOLDSTEIN,
Plaintiff-Appellee,
Cross-Appellant,

Versus

MANHATTAN INDUSTRIES, INC.,
a corporation
Defendant-Appellant,
Cross-Appellee.

Appeal from the United States District Court for the Northern District of Alabama

[Filed May 30, 1985]

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion April 25, 1985, 11 Cir., 198—, —— F.2d ——).
(May 30, 1985)

Before KRAVITCH and JOHNSON, Circuit Judges, and TUTTLE, Senior Circuit Judge

PER CURIAM:

(✓) The Petition for Rehearing is DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the

members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ PHYLLIS KRAVITCH
United States Circuit Judge

REHG-6

(Rev. 6/82)

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA SOUTHERN DIVISION

Civil Action No.

82-AR-2095-S

LAWRENCE GOLDSTEIN,
Plaintiff

VS.

MANHATTAN INDUSTRIES, INC.,
Defendant

ORDER

[Filed April 6, 1984]

The following motions are pending in the above entitled cause:

1. Plaintiff's motion filed March 30, 1984, for the award of attorney's fees.

2. Plaintiff's motion filed April 4, 1984, to shorten the time for defendant's response to plaintiff's post-trial discovery requests dealing with the computation of the pension benefits ordered restored to plaintiff.

3. Plaintiff's motion filed April 5, 1984, for an order to show cause why defendant should not reinstate plaintiff as ordered.

4. Plaintiff's motion filed April 5, 1984, to correct an obvious error in the Order dated March 16, 1984.

5. Defendant's motion filed April 4, 1984, for a stay pending appeal and for an order fixing a supersedeas bond.

On April 4, 1984, defendant filed a notice of appeal. Nevertheless, the Court deems it appropriate to grant

plaintiff's motion to correct the clerical error in the order dated March 16, 1984, by reversing the words "plaintiff" and "defendant" in the second paragraph of said order, and the said motion is hereby GRANTED.

Defendant's motion for a stay pending appeal and for the fixing of a supersedeas bond is GRANTED. The enforcement of the judgments and orders entered on February 16, 1984, on March 9, 1984, and on March 23, 1984, (all of the orders appealed from) shall automatically be STAYED pending defendant's appeal, upon defendant's posting a supersedeas bond with good and sufficient sureties approved by the Clerk in the sum of $350,000.

Plaintiff's request for attorney's fees will be DEFERRED by the Court of its own motion pending the appeal because if defendant is completely successful on its appeal, plaintiff will not be a prevailing party and will not be entitled to recover attorney's fees, and if defendant is unsuccessful in its appeal, the attorney's fees and expenses will obviously be greater than at present. Furthermore, the unresolved issues as to pension benefits and the terms of the reinstatement may influence the amount of the attorney's fees and expenses.

Plaintiff's other motions either will be controlled by the stay pending appeal in the event defendant posts its supersedeas or should be deferred pending appeal. Therefore the Court will not rule on the other pending motions.

DONE this 6th day of April, 1984.

/s/ William M. Acker, Jr.
William M. Acker, Jr.
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA SOUTHERN DIVISION

Civil Action No.

82-AR-2095-S

LAWRENCE GOLDSTEIN,
Plaintiff

VS.

MANHATTAN INDUSTRIES, INC.,
Defendant

ORDER

[Filed March 16, 1984]

On March 15, 1984, plaintiff, Lawrence Goldstein, filed his remittitur in the amount of $56,000 as required by the Order of this Court of March 9, 1984, consenting to a reduction in the judgment against defendant to $293,400.00. Accordingly, the amount of the judgment is hereby REDUCED to $293,400.00, for which execution may issue.

Also on March 15, 1984, plaintiff, Lawrence Goldstein, filed a motion for reconsideration of the Court's Order of March 9, 1984, insofar as it denies plaintiff "front pay" and requires plaintiff to reinstate defendant to his position as a sales representative. While it may or may not be true that defendant, Manhattan Industries, Inc., now has a sales representative in plaintiff's old territory, contrary to the testimony of Mr. Imber that Manhattan does not have such a representative, the order of reinstatement causes Manhattan more of a problem that it causes Goldstein. For instance, if Manhattan refuses to reinstate Goldstein as ordered and instead takes an appeal, the amount of the supersedeas bond to protect Goldstein pending such an appeal will be substantial, but if Manhattan does reinstate Gold-

stein precisely as ordered and thus obtains a "benefit" from the final decree, it may thereby be waiving its right to appeal as to the basic finding of liability under ADEA. Without further speculating over the problems inhering for each party in the present situation, plaintiff's motion for reconsideration is hereby DENIED.

Pursuant to Rule 54(b), F.R.Civ.P, the Court determines that there is no just cause for delay in entry of final judgment in favor of plaintiff and against defendant as to each and every aspect of relief heretofore granted and the entry of such judgment is hereby DIRECTED.

DONE this 16th day of March, 1984.

/s/ WILLIAM M. ACKER, JR.
William M. Acker, Jr.
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA SOUTHERN DIVISION

Civil Action No.

82-AR-2095-S

LAWRENCE GOLDSTEIN,
Plaintiff

VS.

MANHATTAN INDUSTRIES, INC.,
Defendant

MEMORANDUM OPINION

[Filed March 9, 1984]

The Court has heard arguments in support of and in opposition to the motion of defendant, Manhattan Industries, Inc. (Manhattan), for judgment notwithstanding the verdict and, in the alternative, for a new trial, and defendant's separate motion for relief from judgment.

The Size of the Verdict

The only real issue raised in defendant's post-trial motions not raised in its motion for directed verdict at trial is the alleged excessiveness of the jury verdict. Defendant argues that the size of the verdict constitutes positive proof of passion and prejudice on the part of the jury. Plaintiff, Lawrence Goldstein (Goldstein), on the other hand, argues that there is evidence to support the verdict for lost earnings in the amount of $175,000.

When Goldstein's own attorney urged $146,700 to the jury in his closing argument as his client's maximum lost earnings, using the computation of his own expert, Dr. Ingatin, the said figure of $146,700, in the Court's

opinion, effectively became the maximum, and capped the lost earnings claim at $146,700. Still, the Court is unwilling to leap from that conclusion to the conclusion that the differential between $146,700 and $175,000 constitutes a sufficient difference to shock the conscience of the Court and indicate that the jury totally lost its reason and resorted to passion and prejudice as its sole motivation. Instead, the Court finds that a remittitur which reduces the verdict to $146,700 for Goldstein's lost earnings will suffice to accomplish substantial justice. As this Court concluded in *Cowen v. Standard Brands, Inc.*, 572 F. Supp. 1576 (N.D. Ala. 1983), liquidated damages in the same amount as the lost earnings has become virtually automatic in ADEA cases. In the instant case this is doubly true where the jury made a specific finding of a "wullful" violation of ADEA in response to a special interrogatory drafted by defendant itself.

Manhattan, as it must, argues that there is no substantial evidence under the test of *Boeing v. Shipman*, 411 F.2d 365 (5th Cir. 1969), to form a basis for a jury question of age discrimination in employment. Its argument is that because Goldstein's replacement was 43 years old, and thus himself a member of the protected age group under ADEA, there can, as a matter of law, be no age discrimination. In the Court's opinion, the age differential here was sufficient to make out the classic prima facie case. The Court can see no rational basis for distinguishing between a replacement who is 39 and a replacement who is 43, when the man replaced is 61. Manhattan's articulated "legitimate, non-discriminatory reason" for terminating Goldstein was that Goldstein had refused to return to a position as its "exclusive" representative, giving up his representation of "outside lines" of women's clothing. Manhattan's testimony was that Goldstein rejected its offer even though it promised to return to him the Rich's and Davison's accounts which previously had been "house accounts".

Goldstein's evidence was substantial to the effect that this articulated reason was "pretextual" and clearly meets the *Boeing v. Shipman* test. Goldstein's own testimony was that he was singled out among all of those sales representatives returning to an "exclusivity" arrangement with Manhattan because only he was not offered the so-called "house accounts". This testimony drew a clear line as to credibility between the conflicting versions of the treatment Goldstein received. In addition, the testimony that Manhattan had interveiwed a prospective 43 year old replacement before it made any proposition whatsoever to Goldstein arguably creates an inference of a predisposition by Manhattan to run Goldstein off. Why? Furthermore, Manhattan's printed sales brochure went to the printers without Goldstein's name even before Goldstein was informed of the proposed new arrangement. Lastly, and of great significance, a Manhattan executive wrote to EEOC articulating a reason for Goldstein's termination different from the reason articulated at trial. There is an irreconcilable conflict between Goldstein's departure being occasioned by his poor performance and being occasioned by his unwillingness to accept the terms offered everyone else. These cumulative pieces of evidence circumstantially add up to "pretext". Under these facts, Goldstein need not depend upon his weaker statistical case to make out his jury question of age discrimination and the Court will not discuss the statistical evidence.

The Scope of "Lost Earnings"

Manhattan renews its argument that the diminution in Goldstein's income from his "outside lines" because of this termination does not constitute the loss of "incidental benefits" from his employment and is not recoverable. While the Court finds no decision directly on this point, neither has Manhattan pointed to such a decision. That the Court's ruling on this question reflected in its charge

to the jury was correct is now confirmed not only by the logic behind the general purpose for awarding damages, which is to restore a plaintiff to the position he would have been in but for a defendant's wrongful act, but during debate on the 1978 amendment to ADEA, as reflected at 1978 U.S. Code Cong. & Ad. News 535, the Conference agreement indicates:

> Under section 7(b), which incorporates the remedial scheme of sections 11(b), 16 and 17 of the FLSA, "amounts owing" contemplates two elements: First, it includes items of *pecuniary or economic loss* such as wages, fringe, and other *job-related benefits.* (emphasis supplied).

The Congressional intent seems clear to allow for recovery of the kind of loss suffered here by Goldstein under an agreement which Manhattan entered into with its eyes open to allow Goldstein to show "outside lines" in the Manhattan showroom.

Front Pay Vs. Reinstatement

Goldstein now insists that he should receive "front pay" and not be reinstated. Before the Court discontinued the hearing of evidence on the proper amount of "front pay" in order to first to decide whether or not Goldstein should be reinstated instead of receiving "front pay", the "front pay" suggested by Goldstein's witnesses had reached astronomical proportions, far beyond any "front pay" awarded in other cases with which this Court is familiar.

As to the basic availability or propriety of "front pay" in ADEA cases, opinion is divided, and there is no clear expression from the Eleventh Circuit or from the Supreme Court on the subject. The following appears at Schlei & Grossman, *Employment Discrimination Law,* Second Edition (1983), at page 523:

> Although some courts, in dicta, have indicated that front pay in lieu of reinstatement may be appropriate under the ADEA, other courts have disagreed.

In footnote 227 at page 524, the decisions of the disagreeing courts are cited by Schlei & Grossman as follows:

> See *Jaffee v. Plough Broadcasting Co.*, 19 FEP 1194, 1195 (D. Md. 1979) (front pay too speculative and interferes with conciliatory purposes of statute). *Accord: Mader v. Control Data Corp.*, 19 FEP 1192, 1193-94 (D. Md. 1978) (claim for loss of anticipated damages too speculative and interferes with congressional policy favoring conciliation); *Covey v. Robert A. Johnston Co.*, 19 FEP 1188, 1191-92 (D. Md. 1977) (claim for lost income and benefits projected into future if reinstated speculative and not awardable).

Although this Court is not willing to say that there can never be an ADEA case in which "front pay" would be appropriate, this Court, in an exercise of its discretion, finds that this case is not such a case.

In the first place, in his statement of plaintiff's position as set forth in the pre-trial order of November 2, 1983, Goldstein said:

> Plaintiff seeks backpay, together with interest and an award of liquidated damages in an amount equal to backpay, *reinstatement (or alternatively front pay)* and his costs and attorney's fees. (emphasis supplied).

Thus, Goldstein sought reinstatement. Only alternatively did he seek front pay. Secondly, Manhattan now has no sales representative in Goldstein's old territory. Speaking through Mr. Imber, Manhattan testified believably that it would be quite pleased again to have Goldstein as its exclusive representative (including Rich's and Davison's). While the Court does not doubt Goldstein's reluctance to

return to Manhattan after the trauma of litigation, the Court also suspects that Goldstein's reluctance is occasioned to some degree by the "exclusivity" feature of such a return, a feature which may cost Goldstein too much because of the loss of his income from his "outside lines". The Court is totally unimpressed with the testimony of Mr. Billingsley and Dr. Roberts to the effect that Goldstein will be "disgraced" if he returns to Manhattan. In any event, the Court concludes that Manhattan's willingness to accept Goldstein with open arms should not, in equity and good conscience, be rejected out of hand. To reject Manhattan's indicated willingness to reinstate Goldstein would, in effect, be to punish Manhattan by the imposition of a further money judgment in the form of "front pay", a concept which invariably has a somewhat arbitrary and speculative character. Therefore, Manhattan will be enjoined to return Goldstein to a position as its exclusive sales representative in Goldstein's old territory as it existed prior to his termination on the same terms and conditions that Manhattan now has with its comparable sales representatives in other territories. This injunction shall include an adjustment for pension contr utions which will establish for Goldstein the same pension benefits that he would have received had he not been terminated. This computation may require an accounting in the event the parties are unable to agree upon the formula for a full restoration of pension benefits.

An appropriate order will be entered contemporaneously.

DONE this 9th day of March, 1984.

/s/ William M. Acker, Jr.
William M. Acker, Jr.
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA SOUTHERN DIVISION

Civil Action No.

82-AR-2095-S

LAWRENCE GOLDSTEIN,
Plaintiff

vs.

MANHATTAN INDUSTRIES, INC.,
Defendant

ORDER

[Filed March 9, 1984]

In accordance with the accompanying Memorandum Opinion, it is ORDERED, ADJUDGED and DECREED by the Court as follows:

1. Within 10 days from this date, plaintiff shall file a remittitur in the amount of $56,600.00. If plaintiff does not file such a remittitur, the jury verdict shall automatically be set aside and a new trial ordered. If plaintiff files such a remittitur, all of defendant's post-trial motions shall automatically be overturned.

2. Furthermore, if plaintiff files the said remittitur, Manhattan shall forthwith reinstate Goldstein as its exclusive sales representative in Alabama, Georgia and the panhandle of Flordia, and Manhattan shall maintain no "house accounts" in said territory. The said reinstatement shall be on terms and conditions as advantageous to plaintiff as those terms and conditions between defendant and defendant's present sales representatives having comparable sales territories. This injunction shall include a restoration of all pension benefits to plaintiff as if he had

not been terminated. If plaintiff and defendant have not within 30 days after such a remittitur agreed upon the terms of the said pension restoration, either party may report this fact to the Court, whereupon the issue of pension restoration will be referred to a Magistrate for resolution or recommendation.

3. In the event of such a remittitur and the resolution of the issue of pension benefits, the only issue remaining will be plaintiff's requests for attorney's fees and costs upon which plaintiff shall file affidavits and any brief he wishes to file. After receipt of such affidavits and brief, defendant shall have 10 days within which to respond.

DONE this 9th day of March, 1984.

/s/ William M. Acker, Jr.
William M. Acker, Jr.
United States District Judge

JUDGMENT ON JURY VERDICT

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Case Number:

CV 82-AR-2095-S

LAWRENCE GOLDSTEIN,
Plaintiff

VS.

MANHATTAN INDUSTRIES, INC.,
a corporation,
Defendant

JUDGMENT

[Filed February 16, 1984]

This action came on for trial on February 9, 1984, before the Court and a jury, Honorable William M. Acker, Jr., United States District Judge, presiding, and the issues having been duly tried and the jury having rendered its verdict.

It is ORDERED and ADJUDGED that the plaintiff, Lawrence Goldstein, have and recover of the defendant, Manhattan Industries, Inc., a corporation, the sum of $175,000.00, in accordance with the interrogatory verdict of the jury this day filed as follows:

1. Do you find that age was a determining factor in the decision of the employer to terminate the employee?

   ANSWER: YES

2. If the answer to Question Number 1 is "Yes", do you find the act of discrimination was willful as defined to you by the Court?

   ANSWER: YES

3. If the answer to Question Number 1 is "Yes", what amount of money do you award to the plaintiff for lost wages and benefits as defined to you by the Court from the time of his discharge until today?

   ANSWER: $175,000.00;

plus the sum of $175,000.00 for liquidated damages pursuant to the provisions of 29 United States Code, Section 626(b), for a total judgment of $350,000.00

It is further ORDERED that the costs are taxed against the defendant; that the proceeds of the judgment and costs recovered herein be paid directly to counsel for the plaintiff, and upon receipt thereof, counsel for plaintiff will satisfy said judgment on the records of this Court.

It is further ORDERED that the Court reserves for consideration the equitable issues of reinstatement and/or "front pay".

JAMES E. VANDEGRIFT, Clerk

By: /s/ RITA F. DURNAK
Deputy Clerk

DATED: February 16, 1984
Birmingham, Alabama

Court Reporter: Lee Cook

Supreme Court, U.
FILED
NOV 12 1985
JOSEPH F. SPANIOL,
CLERK

No. 85-260

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

MANHATTAN INDUSTRIES, INC.,
Petitioner,

v.

LAWRENCE GOLDSTEIN,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

RESPONSE IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

*JOHN C. FALKENBERRY
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Attorneys for Respondent
Lawrence Goldstein

**Counsel of record*

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QUESTIONS PRESENTED

1.

Must a terminated employee prove, in order to establish a **prima facie** case under the Age Discrimination in Employment Act, 29 U.S.C. § 621 **et seq.**, that he was replaced by a person younger than 40 years of age?

2.

Where a jury finds both that an employee's right to sell non-competing "outside lines" was a benefit of his employment with his primary employer and also that lost income from those outside lines was caused by that employer's discriminatory discharge of the employee, does the petition present any substantial issue warranting review?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-260

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v.

LAWRENCE GOLDSTEIN,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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RESPONSE IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

STATEMENT OF THE CASE

In March, 1960, Respondent Lawrence Goldstein (''Goldstein'') became employed by Petitioner Manhattan Industries, Inc. '(''Manhattan'') as a sales representative in its Lady Manhattan division. Goldstein, who was 38 years old at the time, served as an exclusive Manhattan representative in Alabama, Georgia and the Florida panhandle, until he was terminated in 1982, at age 60.

In 1979, Manhattan reorganized its marketing program and converted the major department stores in each sales territory to "house accounts," serviced directly from the New York office. Goldstein's major store accounts, the Rich's and Davison's stores in Atlanta, had produced a substantial portion of his income. To offset this loss, Manhattan allowed Goldstein to begin selling non-competing apparel lines along with his Manhattan products. Goldstein used Manhattan as his "headliner" and regularly advertised in trade papers the fact that both his Manhattan goods and his so-called "outside lines" would be shown in the Manhattan showroom in the Atlanta Apparel Mart and elsewhere.

Despite Manhattan's increasingly poor product line, in both 1980 and 1981 Goldstein's sales of Lady Manhattan products were among the highest in the company. Using his "headliner" and the desirable location of the Manhattan showroom in the Atlanta Apparel Mart, Goldstein successfully attracted customers for all of his merchandise, and sales from his outside lines increased to replace the income he lost when the Rich's and Davison's accounts were taken from him.

In early 1982, two substantially younger men, Bob Guberman, age 41, and Preston Imber, age 39, took over management of the Lady Manhattan division, and decided that sales representatives would be required to return to their former exclusive basis. Goldstein, then age 60, was targeted as one of the first six sales representatives who would be required to abandon their outside lines. One of Guberman's first steps was to begin to interview applicants for positions as sales representative in the Southeast, and on March 4, he went to Atlanta to interview Michael Eiseman, who was 14 years

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Around 8:30 that same evening, Guberman telephoned Goldstein in Birmingham and broke the news to him that Manhattan expected him to give up his outside lines and return to an exclusive basis. According to Goldstein, Guberman said nothing about restoring to him the Rich's and Davison's accounts. Goldstein protested that it was unfair to ask him to give up his outside lines without restoring to him the Rich's and Davison's accounts, and offered a counter-proposal, whereby his nephew would assume primary responsibility for the outside lines, while he continued to concentrate on Manhattan. Guberman rejected the counter-proposal in a letter reiterating his insistence that Goldstein abandon his outside lines, but which said nothing about returning Goldstein's major store accounts. Guberman's handwritten draft of the same letter assigned Goldstein a sales target: "Your present target for the fall 82 season is $350,000. Excluding Richs & Davidsons." This draft also referred to substandard sales performance, a subject not mentioned in either the March 11 letter, or in a typed draft of the same letter dated March 10. Goldstein's name was omitted from an official sales brochure mailed out on March 9 and 10.

Guberman wrote Goldstein another letter, dated March 12 but not mailed until March 15, advising that Goldstein's employment would be terminated effective March 15. Of course, Guberman had already hired

Eiseman to replace Goldstein under the same exclusive arrangement as had been required of Goldstein, but Eiseman was given the Rich's and Davison's accounts.

Goldstein did not receive the March 15 termination letter before he traveled to New York for a Manhattan sales meeting. While in New York, Goldstein learned that other salesmen who had been required to return to exclusivity also had regained their major store accounts. At the conclusion of the sales meeting, Goldstein met with Guberman and Imber and confronted them with not being given the same consideration as other salesmen. Guberman became angry, accused Goldstein of never intending to accept the job, and terminated Goldstein's employment. When Goldstein returned to Birmingham, Guberman's March 12 letter of termination was waiting for him.

At trial, Goldstein offered the expert testimony of a labor economist, in addition to his own testimony, to establish that although he continued to sell his "outside lines" after his termination, his loss of the Manhattan line adversely affected his ability to sell the other products. For example, instead of showing his goods in Manhattan's desirable location in the Apparel Mart, Goldstein was relegated to a temporary booth on the lower level of the building, where even his regular customers had difficulty finding him. The loss of his headliner also eliminated his entree which aided him in successfully marketing his noncompeting lines. The labor economist conservatively estimated Goldstein's net loss earnings from both Manhattan (assuming the exclusion of Rich's and Davison's) and his outside lines.

The jury returned a verdict in Goldstein's favor, awarding him lost wages and benefits, and also found that Manhattan's violation of the ADEA was willful. The trial judge thereafter awarded Goldstein damages in an amount equal to back pay and benefits and entered a judgement against Manhattan.

REASONS FOR DENYING THE WRIT

Manhattan suggests that its petition "presents to this Court for the first time two issues of special importance." To the contrary, the petition presents no substantial question arising under the Age Discrimination in Employment Act, 29 U.S.C. § 621, **et seq.** ("ADEA") warranting review by this Court. At most, Manhattan merely rehashes a jury's award of lost wages which was based on substantial, if not uncontroverted evidence.

I. Neither this Court Nor Any Court of Appeals Has Required That a Plaintiff May Recover in an Action Under the ADEA Only if He Proves That He Was Replaced By a Person Younger Than 40 Years of Age.

Manhattan seeks review in this case to establish a proposition of law contrary to the authorities of this Court and rejected unanimously by every Court of Appeals which has considered the issue. Manhattan nonetheless urges that in an action under the ADEA, a Plaintiff may prevail only upon proof that he was replaced by a person younger than 40 years old.

A plaintiff's initial burden in an action under the ADEA is to present evidence sufficient "to create an

inference that an employment decision was based on a discriminatory criterion illegal under the Act." **International Brotherhood of Teamsters v. United States,** 431 U.S. 324, 358 (1977) (construing Title VII of the Civil Rights Act of 1964, 42 U.S. C. § 2000e, **et seq.**). A plaintiff may satisfy that burden by either direct or circumstantial evidence, but because direct evidence of an employer's discriminatory motive is often difficult to obtain, a plaintiff will often rely on the guidelines established in **McDonnell Douglas Corp. v. Green,** 411 U.S. 792 (1973), a Title VII case often adapted for use in ADEA actions. **See, Pace v. Southern Railway System,** 701 F. 2d 1383, 1386 (11th Cir.) **cert. denied,** _____ U.S. _____, 104 S. Ct. 549 (1983); **Elliott v. Group Medical & Surgical Service,** 714 F. 2d 556, 565, n. 11 (5th Cir. 1983), **cert. denied,** _____ U.S. _____, 104 S. Ct. 2658 (1984); **Smithers v. Bailar,** 629 F. 2d 892, 894 (3d Cir. 1980); **Price v. Maryland Casualty Co.,** 561 F. 2d 609, 612 (5th Cir. 1977).

Contrary to Manhattan's position, the **McDonnell Douglas** test, as originally articulated, did not include proof that a person outside the protected class was favored over the plaintiff; this Court allowed a plaintiff to prove a **prima facie** case of racial discrimination by showing:

> (i) that he belongs to a racial minority; (ii) that he applied for and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

411 U.S. at 802. In a footnote, this Court explained what has since been accepted universally as a correct statement of the law in both Title VII and ADEA cases, that

> The facts necessarily will vary in Title VII cases and the specification above of the prima facie proof required from respondent is not necessarily applicable in every respect to differing factual situations.

Id. n. 13. This Court subsequently made it clear that **McDonnell Douglas** was not intended to be "rigid, mechanized, or ritualistic." **Furnco Construction Corp. v. Waters,** 438 U.S. 567, 577 (1978). Very recently, in **Cooper v. Federal Reserve Bank of Richmond,** _____ U.S. _____, 104 S. Ct. 2794, 2799 (1984), this Court again enumerated the elements of a **prima facie** case under **McDonnell Douglas** and did not include a requirement that a plaintiff prove replacement by a person outside the protected class.

Especially in ADEA cases, the Courts of Appeal have warned against strict application of the **McDonnell Douglas** guidelines. **E.g.,** the former Fifth Circuit's admonition in **Marshall v. Goodyear Tire & Rubber Co.,** 554 F. 2d 730, 745 (5th Cir., 1977) that **McDonnell Douglas** "does not establish an immutable definition of a **prima facie** case." **See, also, McCorstin v. United States Steel Corp.,** 621 F. 2d 749, 753 (5th Cir. 1980) ("not the alpha and omega of possible tests in the age discrimination context"); **DeHues v. Western Electric Co., Inc.,** 710 F. 2d 1344, 1347 (8th Cir. 1983).

Every Court of Appeals which has addressed this issue has permitted an ADEA plaintiff to prove a **prima facie** case by offering evidence that the favored person

was younger than the plaintiff. In **Loeb v. Textron, Inc.**, 600 F. 2d 1003, 1013 (1st Cir. 1979), the First Circuit reversed a jury charge requiring the plaintiff to prove that he was replaced by a person outside the protected age group, pointing out that **McDonnell Douglas** itself contained no such requirement. And in **Elliott v. Group Medical & Surgical Services, supra,** at 562, the Fifth Circuit held that the fourth prong of the **McDonnell Douglas** test could be satisfied by proof that the plaintiff was replaced either by a person outside the protected class, or merely by someone younger than plaintiff. Other circuits are in accord. **Haskell v. Kaman Corp.**, 743 F. 2d 113, 119 n. 1 (2d Cir. 1984) (characterizing the **McDonnell Douglas** test as requiring proof of favored treatment of a younger person rather than a person younger than 40); **Cuddy v. Carmen,** 694 F. 2d 853, 857 (D.C. Cir. 1982) (same); **Ackerman v. Diamond Shamrock Corp.**, 670 F. 2d 66, 69 (6th Cir. 1982) (same); **Maxfield v. Sinclair International,** 766 F. 2d 788, 793 (3rd Cir. 1985) (rejecting notion that any court ever held that replacement by a person under 40 was required under the ADEA); **Douglas v. Anderson,** 656 F. 2d 528 (9th Cir. 1981) (replacement by a slightly younger employee and evidence of substantially equal or superior qualifications satisfies **McDonnell Douglas**).

The decision of the Court of Appeals for the Eleventh Circuit thus in no way conflicts with applicable decisions by this Court or by any other Court of Appeals on the same matter.

II. The Jury's Award of Lost Wages and Benefits Was Supported by Substantial Evidence, Was Limited to the Facts of the Case, and Presents No Significant Issue for Review By the Court.

Manhattan's argument Goldstein is not entitled to recover monetary losses from his "outside lines" presents no significant question of policy or precedent and reflects only Manhattan's subjective disagreement with the jury's verdict in this case.

The trial judge instructed the jury that it should decide both the factual issue whether Goldstein's income from outside lines was a job-related benefit of his employment with Manhattan and the causal issue whether Goldstein suffered any loss therefrom, as well as the amount of loss, if any. Consistent with those instructions, the jury returned an interrogatory verdict finding that Goldstein's right to carry "outside lines" was a benefit of his employment and awarding Goldstein "lost wages and benefits," which included losses on those outside lines.

Manhattan does not contend that job-related benefits are never recoverable under the ADEA. Rather, its petition complains merely that the jury's reasoning was skewed and that it should have returned a verdict for Manhattan rather than awarding Goldstein anything, much less any lost income from his outside lines. Thus, Manhattan falls far short of its burden under Rule 19 to show that special and important reasons exist for granting the writ of certiorari.

As the Court of Appeals recognized below, Congress' clear intention that ADEA plaintiffs recover all lost wages and benefits caused by an employer's age discrimination is reinforced by the House Conference Report on the 1978 amendments to the ADEA. That report confirms that the term "amounts owing" under 29 U.S.C. § 626(b) "includes items of pecuniary or economic loss such as wages, fringes, **and other job related benefits.**" H.R. Conf. Rep. No. 95-950, 95th Cong., 2d Sess. 13, **reprinted in** 1978 U.S. Cong. Code & Ad. News 504, 528, 535. (Emphasis supplied).

The Eleventh Circuit also relied on its decision in **Walker v. Ford Motor Co.**, 684 F. 2d 1355, 1364 (11th Cir. 1982), another Title VII case, which holds that a plaintiff may recover lost job benefits which constitute "concomitants of employment." Consistent with this result are two ADEA cases, **Kelly v. American Standard, Inc.**, 640 F. 2d 974, 985-86 (9th Cir. 1981), affirming the award of start-up costs of a new business venture following the discriminatory discharge of a sales representative, and **Blim v. Western Electric Co.**, 731 F. 2d 1473, 1480 (10th Cir. 1984), awarding plaintiff losses in Social Security benefits resulting from his discriminatory termination.

Here, Goldstein presented substantial evidence from which the jury was entitled to conclude both that his right to sell non-competing outside lines in addition to the Manhattan line was a fringe benefit or concomitant of his employment by Manhattan, and that economic loss resulted from Manhattan's discriminatory termination of that benefit. As to the amount of loss, Goldstein presented uncontradicted expert testimony which projected his anticipated earnings from his outside lines, and upon which the jury could base its verdict.

Factual determinations in ADEA cases must be treated no differently from any other findings by the trier of fact. **EEOC v. Wyoming Retirement System,** 771 F. 2d 1425, 1429 (10th Cir. 1985). Such findings cannot be reversed unless clearly erroneous. **Anderson v. City of Bessemer City, N.C.,** _____ U.S. _____, 105 S. Ct. 1504, 1511 (1985); **United States v. United States Gypsum Co.,** 333 U.S. 364, 395 (1948). Of course, where a jury is the trier of fact, the presumption in favor of the correctness of the result is even stronger. As this Court recently stated: "A reviewing court must begin with the reality that the jurors sat in the same room day after day with the [parties] . . . and their lawyers . . ." **United States v. Hastings,** _____ U.S. _____ 103 S. Ct. 1974, 1981 (1983).

CONCLUSION

Because the petition utterly fails to establish either the existence of any important question of federal law to be decided by this Court or that the decision of the Court of Appeals below conflicts in any way with any decision of this Court or another Court of Appeals, the petition should be denied.

Respectfully submitted,

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QUESTIONS PRESENTED

1.

Must a terminated employee prove, in order to establish a **prima facie** case under the Age Discrimination in Employment Act, 29 U.S.C. § 621 **et seq.**, that he was replaced by a person younger than 40 years of age?

2.

Where a jury finds both that an employee's right to sell non-competing "outside lines" was a benefit of his employment with his primary employer and also that lost income from those outside lines was caused by that employer's discriminatory discharge of the employee, does the petition present any substantial issue warranting review?

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Especially in ADEA cases, the Courts of Appeal have warned against strict application of the **McDonnell Douglas** guidelines. **E.g.,** the former Fifth Circuit's admonition in **Marshall v. Goodyear Tire & Rubber Co.,** 554 F. 2d 730, 745 (5th Cir., 1977) that **McDonnell Douglas** "does not establish an immutable definition of a **prima facie** case." **See, also, McCorstin v. United States Steel Corp.,** 621 F. 2d 749, 753 (5th Cir. 1980) ("not the alpha and omega of possible tests in the age discrimination context"); **DeHues v. Western Electric Co., Inc.,** 710 F. 2d 1344, 1347 (8th Cir. 1983).

Every Court of Appeals which has addressed this issue has permitted an ADEA plaintiff to prove a **prima facie** case by offering evidence that the favored person

was younger than the plaintiff. In **Loeb v. Textron, Inc.**, 600 F. 2d 1003, 1013 (1st Cir. 1979), the First Circuit reversed a jury charge requiring the plaintiff to prove that he was replaced by a person outside the protected age group, pointing out that **McDonnell Douglas** itself contained no such requirement. And in **Elliott v. Group Medical & Surgical Services, supra,** at 562, the Fifth Circuit held that the fourth prong of the **McDonnell Douglas** test could be satisfied by proof that the plaintiff was replaced either by a person outside the protected class, or merely by someone younger than plaintiff. Other circuits are in accord. **Haskell v. Kaman Corp.**, 743 F. 2d 113, 119 n. 1 (2d Cir. 1984) (characterizing the **McDonnell Douglas** test as requiring proof of favored treatment of a younger person rather than a person younger than 40); **Cuddy v. Carmen,** 694 F. 2d 853, 857 (D.C. Cir. 1982) (same); **Ackerman v. Diamond Shamrock Corp.,** 670 F. 2d 66, 69 (6th Cir. 1982) (same); **Maxfield v. Sinclair International,** 766 F. 2d 788, 793 (3rd Cir. 1985) (rejecting notion that any court ever held that replacement by a person under 40 was required under the ADEA); **Douglas v. Anderson,** 656 F. 2d 528 (9th Cir. 1981) (replacement by a slightly younger employee and evidence of substantially equal or superior qualifications satisfies **McDonnell Douglas**).

The decision of the Court of Appeals for the Eleventh Circuit thus in no way conflicts with applicable decisions by this Court or by any other Court of Appeals on the

II. The Jury's Award of Lost Wages and Benefits Was Supported by Substantial Evidence, Was Limited to the Facts of the Case, and Presents No Significant Issue for Review By the Court.

Manhattan's argument Goldstein is not entitled to recover monetary losses from his "outside lines" presents no significant question of policy or precedent and reflects only Manhattan's subjective disagreement with the jury's verdict in this case.

The trial judge instructed the jury that it should decide both the factual issue whether Goldstein's income from outside lines was a job-related benefit of his employment with Manhattan and the causal issue whether Goldstein suffered any loss therefrom, as well as the amount of loss, if any. Consistent with those instructions, the jury returned an interrogatory verdict finding that Goldstein's right to carry "outside lines" was a benefit of his employment and awarding Goldstein "lost wages and benefits," which included losses on those outside lines.

Manhattan does not contend that job-related benefits are never recoverable under the ADEA. Rather, its petition complains merely that the jury's reasoning was skewed and that it should have returned a verdict for Manhattan rather than awarding Goldstein anything, much less any lost income from his outside lines. Thus, Manhattan falls far short of its burden under Rule 19 to show that special and important reasons exist for granting the writ of certiorari.

As the Court of Appeals recognized below, Congress' clear intention that ADEA plaintiffs recover all lost wages and benefits caused by an employer's age discrimination is reinforced by the House Conference Report on the 1978 amendments to the ADEA. That report confirms that the term "amounts owing" under 29 U.S.C. § 626(b) "includes items of pecuniary or

economic loss such as wages, fringes, **and other job related benefits.**" H.R. Conf. Rep. No. 95-950, 95th Cong., 2d Sess. 13, **reprinted in** 1978 U.S. Cong. Code & Ad. News 504, 528, 535. (Emphasis supplied).

The Eleventh Circuit also relied on its decision in **Walker v. Ford Motor Co.**, 684 F. 2d 1355, 1364 (11th Cir. 1982), another Title VII case, which holds that a plaintiff may recover lost job benefits which constitute "concomitants of employment." Consistent with this result are two ADEA cases, **Kelly v. American Standard, Inc.**, 640 F. 2d 974, 985-86 (9th Cir. 1981), affirming the award of start-up costs of a new business venture following the discriminatory discharge of a sales representative, and **Blim v. Western Electric Co.**, 731 F. 2d 1473, 1480 (10th Cir. 1984), awarding plaintiff losses in Social Security benefits resulting from his discriminatory termination.

Here, Goldstein presented substantial evidence from which the jury was entitled to conclude both that his right to sell non-competing outside lines in addition to the Manhattan line was a fringe benefit or concomitant of his employment by Manhattan, and that economic loss resulted from Manhattan's discriminatory termination of that benefit. As to the amount of loss, Goldstein presented uncontradicted expert testimony which projected his anticipated earnings from his outside lines, and upon which the jury could base its verdict.

Factual determinations in ADEA cases must be treated no differently from any other findings by the trier of fact. **EEOC v. Wyoming Retirement System,** 771 F. 2d 1425, 1429 (10th Cir. 1985). Such findings cannot be reversed unless clearly erroneous. **Anderson v. City**

of Bessemer City, N.C., _____ U.S. _____, 105 S. Ct. 1504, 1511 (1985); **United States v. United States Gypsum Co.,** 333 U.S. 364, 395 (1948). Of course, where a jury is the trier of fact, the presumption in favor of the correctness of the result is even stronger. As this Court recently stated: "A reviewing court must begin with the reality that the jurors sat in the same room day after day with the [parties] . . . and their lawyers . . ." **United States v. Hastings,** _____ U.S. _____ 103 S. Ct. 1974, 1981 (1983).

CONCLUSION

Because the petition utterly fails to establish either the existence of any important question of federal law to be decided by this Court or that the decision of the Court of Appeals below conflicts in any way with any decision of this Court or another Court of Appeals, the petition should be denied.

Respectfully submitted,

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